Supreme Court, U.S.
FILED

05-179 AUG 3 - 2005

OFFICE OF THE CLERK

No. 05-

In the Supreme Court of the United States

BOKOLE ELONGO MOMPONGO,
Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

BOKOLE ELONGO MOMPONGO
Petitioner pro se

11783 NW NARCISSUS STREET
COON RAPIDS, MN 55433
(763) 712-5901

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

1. Whether the Petitioner has demonstrated a clear probability of future persecution should he return to the DRC.

2. Whether the Petitioner has demonstrated that it is more likely than not that he would be tortured should he return to the DRC.

PARTIES TO THE PROCEEDING

The Petitioner is Bokole Elongo Mompongo, an individual.

The Respondent is Alberto R. Gonzales, Attorney General for the United States

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

REASONS FOR GRANTING THE WRIT 6

I. The threat of harm described by the Petitioner makes persecution more probable than not should he return to DRC 6

II. The threat of harm described by the Petitioner justifies a clear probability of Torture should he return to DRC 8

CONCLUSION 9

APPENDIX

Appendix A
Court of Appeals Opinion, 05/05/2005 . . . . . 1a-5a

Appendix B
Decision of the BIA, 01/27/2005 . . . . . 6a-7a

Appendix C
Decision of the Immigration Judge, 12/11/2002 . 8a-9a

TABLE OF AUTHORITIES

CASE LAW

Ananeh-Firempong v. INS,
766 F.2d 621 (1st Cir. 1985) 7, 8

Elias-Zacharias v. INS, 502 US 478 (1992) 2, 9

Falcon-Carriche v. Ashcroft,
350 F.3d 845 (9th Cir. 2003) 6

Galius v. INS, 147 F.3d 34 (1st Cir. 1998) 8

Magoian v. INS, 184 F.3d 1029 (9th Cir. 1999) 7

Makonnen v. INS, 44 F.3d 1378 (8th Cir. 1995) 7

INS v. Stevic, 467 US 407 (1984) 7

STATUTORY REFERENCES

8 USC 1231(b)(3) 8
28 USC 1254(1) 1

REGULATORY REFERENCES

8 CFR 208.13(b)(2) 7
8 CFR 208.16, 18 . . . . . 2, 8

RULE

Supreme Court Rule 13(1) 1

The Petitioner, Bokole Elongo Mompongo respectfully requests that this Court issue a writ of certiorari to review the judgement entered in this case by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, dated May 05, 2005, is reported at No. 04-1481 and is reproduced in Appendix A at 1a-5a. The Decision of the Board of Immigration Appeals, was dated 01/27/2004 and is reproduced in Appendix B at 6a-7a. The decision of the Immigration Judge, sitting in Bloomington, MN was dated 12/11/2002 and is reproduced at Appendix C at 8a-9a. The decision of the Chicago Asylum Office is not available.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on May 05, 2005. This court has jurisdiction under 28 USC 1254(1). This appeal was timely filed within 90 days of the decision of the Eighth Circuit Court of Appeals, dated May 05, 2005. Supreme Court Rule 13(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

An alien found within the boundaries of the United States who is unable or unwilling to return to his country of origin may file for asylum. 8 USC 1158. The asylum claimant states that he/she is unable to return to his/her country of origin because of persecution or a well founded fear of persecution. 8 USC 1101(a)(42)(A). An alien subject to removal from the U.S. may claim withholding of removal by

establishing that his life or freedom would be threatened on the basis of race, nationality, religion, membership in a particular political or social group. 8 USC 1231(b)(3). An alien subject to removal from the U.S. may claim withholding of removal based upon a clear probability of torture, by or at the behest of a government official. 8 CFR 208.16(c).

Reviewal of decisions of the administrative agency are reviewed for issues of law and of evidence. The decision of the administrative agency must be supported by substantial evidence. *Elias-Zacharias v. INS,* 502 US 478 (1992). The Petitioner bears the burden of showing that "the record evidence was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution" *Elias-Zacharias v. INS,* 502 US 478 (1992). Issues of law are reviewed to determine if they are manifestly contrary to law and abuse of discretion. 8 USC 1252(b)(4)(D).

STATEMENT OF THE CASE

The Petitioner arrived in the United States most recently on March 12, 1997 as an H-1B worker. He originally arrived in the United States on 01/01/91 in Atlanta Georgia to attend Mercer College, Macon, Georgia in Electrical Engineering. He returned to DRC on February 11, 1997, but due to conditions of unrest returned to the U.S. one month later.

The Petitioner discontinued his employment with CTI under the H-1B program on or about October of 1997 and moved to Minneapolis, Minnesota to live with a cousin due to his psychological condition regarding the whereabouts of his family in the DRC. He filed an affirmative application for asylum with the Chicago Asylum Office on or about February 21, 2001. This application was referred to the Immigration Court with a notice to appear dated August 14, 2001. He

renewed his claim for asylum along with withholding of removal and application of the United Nations Convention Against Torture at a Master Calendar hearing dated September 18, 2001.

These applications for asylum, withholding of removal and application of the United Nations Convention Against Torture was denied in decision of the Immigration Judge dated December 11, 2002. (Appendix C, pg 8a-9a). The Petitioner subsequently appealed this decision to the Board of Immigration Appeals. This appeal was denied in a decision dated January 27, 2004 in a summary affirmance without opinion. (Appendix B, pg 6a).

The Petitioner subsequently filed a Petition for Review with the Eighth Circuit Court of Appeals dated February 26, 2004. This Petition for Review was denied in a decision dated May 05, 2005. (appendix A, pgs 1a-5a).

STATEMENT OF THE FACTS

The Petitioner first entered the United States on January 01, 1991 at Atlanta, Georgia on an F-1 visa. He attended Mercer University where he pursued a degree in electrical engineering. He completed this degree and entered employment under the H-1B category with CMI (Certified Measurement Instruments) on or about August 20, 1996.

After six months in this position he left to return to his country of origin. He departed the United States on February 11, 1997 and returned one month later on March 12, 1997 due to conditions of unrest in DRC. He returned to his employer in Georgia, CMI.

In May of 1997 the regime of longstanding ruler Mubuto Sese Seko was overthrown by the ADFL forces of Laurent Kabila. (Alliance de Forces Democratiques pour Liberation du Congo-Zaire). As a result, persons associated with the former regime of Mubuto and the MPR party (Movement Populaire de la Revolution, Popular Movement for the Revolution) were persecuted, tortured and some killed.

Close relatives of the Petitioner were forced to go into hiding. His cousin Imana Ingulu, was a spokesman and television personality for the MPR party and Mubuto and was hounded by security personnel of Laurent Kabila. He was forced to go into hiding and his wife was interrogated and tortured to determine his whereabouts. Another cousin Mpeti-E-Meinga, who served in the president's personal security group was also put on the run. He was later forced to flee to the Central African republic and thence to seek asylum in Sweden. The Petitioner's father died shortly after the change in power due to physical and psychological stress following the necessity of hiding to avoid security personnel who were looking for him and his two aforementioned nephews.

The Petitioner subsequently left his employment at CMI in October of 1997 to live with a cousin in Minneapolis, Minnesota due to his fears of the whereabouts of his family and the psychological stress that this caused. Due to his continuing receipt of information regarding the distressed conditions in DRC and the potential harm to himself as evidenced by the plight of family members in DRC the Petitioner filed an application for asylum with the Chicago Asylum Office on or about 02/21/2001.

The Petitioner himself was an active member of the junior wing of the MPR party known as JMPR (Jeunesse du

Mouvement Populaire de la Revolution, Youth of the Popular Movement of the Revolution) from 1986 to 1990. He was vice president of this chapter and participated in party related activities to promote membership and party principles to youth while attending the Institute of Applied Technology in Kinshasa.

The Petitioner's father was among the first Congolese to obtain a formal education outside the country following the countries independence from Belgium in 1960. He attended Washington State University from 1960 to 1965 and obtained a B.S. in physics. His father was the founder and high school principal in his home city of Ntondo in the Equator province. This is also the home of Mubuto.

As a result of years of dedication to public education, president Mubuto appointed him as Secretary of National Education for the province of Equator. He was later awarded the honor of the "Medaille d'Or de'Ordre National du Leopard" (Gold medal from the National Order of the Leopard). This was a special award given to those who contributed to the community and to public life. This insured him VIP status. His father was well known by many around the DRC for this award.

The Petitioner fears that if he is required to return to the DRC he will be tortured or even killed for his association with his two cousins and his father who were widely known as being associated with the Mubuto regime and the MPR party. The Petitioner knows that his own political involvement could be established as a basis for persecution. He has received warnings from his cousin, Mpeti-E-Meinga not to return to DRC.

REASONS FOR GRANTING THE WRIT

I. The threat of harm presented by the Petitioner justifies a clear probability of a threat to life or freedom should he return to DRC.

The Petitioner's claims for asylum, withholding of removal and application of the United Nations Convention Against Torture was denied by the Immigration Judge in a decision dated December 11, 2002. (appendix C, pgs 8a-9a). The BIA affirmed without opinion in a decision of January 27, 2004. (appendix B, pgs 6a-7a). An affirmance without opinion makes the decision of the Immigration Judge the decision of record. (*Falcon Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003).

The immigration judge indicated that the Petitioner would have been eligible for asylum if he had filed within one year of arrival, or alternately if he filed within a reasonable time following the termination of his non immigrant status. The Immigration Judge found the Petitioner credible. The Eighth Circuit Court of Appeals did not review the claim for asylum, but found that although there was a change in government in DRC following the Petitioner's departure, this only impacted his potential standard of living and that family members of central figures in the former government were not reported to be persecuted. (appendix A, pgs 5a).

To qualify for withholding of removal the Petitioner must show that there is a "clear probability that his life or freedom would be threatened on the basis of race, religion, nationality, membership in a particular political or social group. 8 USC 1231(b)(3). The Petitioner must show that there is a "clear probability" that is "more likely than not" that his life or freedom would be threatened on account of one of the

protected grounds. *INS v. Stevic,* 467 US 407, 429-430 (1984).

The Petitioner claims that he fears persecution based upon his membership in the family unit and also as a former supporter of the Mbuto regime. His cousins (Imanu Ingulu and Mpeti_E-Meinga) have suffered persecution at the hands of the successor regime of Laurent Kabila and now Joseph Kabila his son. His father was also a prominent member of the former regime. The Petitioner claims that his participation in the youth wing of the former regime (JMPR, Youth of the Popular Movement of the Revolution) from 1986-1990 also makes him a target for persecution.

Membership in a family unit that has suffered persecution creates a presumption of a fear of persecution. (see *Mgoian v. INS,* 184 F.3d 1029 (9th Cir. 1998), *Ananeh-Firempong v. INS,* 766 F.2d 621 (1st Cir. 1985). In *Makonnen v. INS,* 44 F.3d 1378 (8th Cir. 1995) the Eighth circuit stated that if a showing of a "pattern or practice" of persecution could be made regarding a particular group than it is not necessary to show that the applicant would be singled out for persecution. (see 8 CFR 208.13(b)(2)(iii)(A))

In *Ananeh-Firempong v. INS,* 766 F.2d 621(1st Cir. 1985) the first circuit court allowed the Petitioner to reopen her case to file for withholding of removal. The court found that the Petitioner's family had been subject to persecution in Ghana and that a class of persons in the Ghanian society had been subject to persecution by the successor government. This class was defined as (1) those associated with the former government; (2) members of the Ashanti tribe; (3) professionals, business people and those that are highly educated. *Ananeh-Firempong* at 623. The court found that it was more likely than not that the Petitioner would be

subject to persecution upon her return under 8 USC 1253(h) now 8 USC 1231(b)(3).

The Petitioner would claim that his status is analogous to that of the Petitioner in *Ananeh-Firempong*. He has documented that his relatives have suffered persecution under the successor regime. He is from the region Equator, that of the former president Mubuto. He is from a family of professionals and is himself highly educated (electrical engineering). These factors make him a target for persecution from a suspicious successor regime. While the government would point to the fact that Department of State reports indicate that family members of former highly placed members of the former regime are not being persecuted, country conditions reports from the Department of State can be countered by a showing of specific danger to the Petitioner. *Galius v. INS,* 147 F.3d 34 (1st Cir. 1998).

II. The threat of harm presented by the Petitioner justifies that it is more likely than not that he would be tortured should he return to DRC.

Torture is defined as "the imposition of severe pain or suffering, either physical or mental, by or at the behest of a public official or one acting in an official capacity. 8 CFR 208.18(a)(1). The possibility of torture must be more likely than not. 8 CFR 208.16. The Petitioner has presented evidence that members of his class of persons, former members of the MPR party have been persecuted by the successor government. He has also presented evidence that the wife of his cousin, Imunu Ingulu was detained by the security police and tortured to determine his whereabouts. Family members of the Petitioner report persecution to themselves and to others by the government.

CONCLUSION

The Petitioner claims that he has presented evidence and legal reasoning that justifies a finding of a clear probability of persecution and a clear probability of torture should he return to DRC. He claims that the evidence was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution. *Elias-Zacarias v. INS,* 502 U.S. 478, 483-484 (1992).

Thereby the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Bokole Elongo Mompongo
Pro se

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 04-1481

[Filed May 5, 2005]

Bokole Elongo Mompongo, Petitioner,

v.

Alberto Gonzales, Attorney General of the United States, Respondent.

On Appeal From Petition for Review of an Order of the Board of Immigration Appeals

Before LOKEN, Chief Judge, RILEY and SMITH, Circuit Judges

OPINION

RILEY, Circuit Judge.

Bokole Elongo Mompongo (Mompongo), a native and citizen of the Democratic Republic of Congo (DRC), petitions for review of a decision of the Board of Immigration Appeals (BIA) affirming without opinion the Immigration Judge's (IJ)

decision denying Mompongo's application for asylum, withholding of removal, and protection under the Convention Against Torture (CAT). We dismiss Mompongo's asylum claim, because we lack jurisdiction to review the decision that the asylum application was untimely. On the merits of Mompongo's requests for withholding of removal and CAT protection, we deny Mompongo's petition.

I. BACKGROUND

Mompongo arrived in the United States from the DRC, formerly Zaire, on March 12, 1997, on a temporary work visa that authorized him to remain in the United States until June 30, 1999. He overstayed his visa, and, on February 21, 2001, Mompongo applied for asylum. The Immigration and Naturalization Service commenced removal proceedings on August 14, 2001.

At an initial hearing, Mompongo admitted the factual allegations contained in the notice to appear; conceded removability; and applied for asylum, withholding of removal, and protection under the CAT. The IJ held an evidentiary hearing, during which Mompongo presented no witnesses other than himself. Mompongo testified he fears persecution if he returns to the DRC, because of his family's associations with the former Mobutu regime, and because of his participation in the youth wing of the Mobutu party.

The IJ concluded Mompongo failed to file his application for asylum within one year of his arrival in the United States, and no changed or exceptional circumstances justified an exception to the one-year requirement. Therefore, the IJ denied as untimely Mompongo's asylum application. The IJ also denied Mompongo's claims for withholding of removal and CAT protection, but granted his request for voluntary

departure. The BIA affirmed without opinion. Therefore, for purposes of judicial review, the IJ's decision constitutes the final agency determination. See Aden v. Ashcroft, 396 F.3d 966, 967 n.1 (8th Cir. 2005).

II. DISCUSSION

Mompongo first challenges the IJ's determination that Mompongo failed to demonstrate changed or extraordinary circumstances excusing the late filing of his asylum application. To qualify for asylum, an alien must "demonstrate[] by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States." 8 U.S.C. § 1158(a)(2)(B). This provision, however, does not apply if the applicant can "demonstrate[] to the satisfaction of the Attorney General either. . .changed circumstances which materially affect the applicant's eligibility. . .or extraordinary circumstances" to justify the delay in filing the application. 8 U.S.C. § 1158(a)(2)(D). Section 1158(a)(3) provides "no court shall have jurisdiction to review" the Attorney General's determination under section 1158(a)(2).

Pursuant to section 1158(a)(2)(B), the IJ denied as untimely Mompongo's application for asylum. The IJ explained that Mompongo filed his application more than one year after arriving in the United States, and the IJ found no changed or extraordinary circumstances to excuse the delayed filing. The IJ's decision is not subject to judicial review. *See* 8 U.S.C. § 1158(a)(3); *Aden*, 396 F.3d at 968; *Ngure v. Ashcroft*, 367 F.3d 975, 989 (8th Cir. 2004).

Although we lack jurisdiction to review Mompongo's claim for asylum, we do have jurisdiction to review the denial of Mompongo's requests for withholding of removal and

protection under the CAT. *See Ngure*, 367 F.3d at 989, 992 (reviewing claims for withholding and CAT protection even though asylum application was untimely). To qualify for withholding of removal, Mompongo must show a clear probability his "life or freedom would be threatened in [the DRC] because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). "In other words, an alien [seeking withholding of removal] must establish that it is more likely than not that he will suffer persecution." *Ngure*, 367 F.3d at 989. To qualify for protection under the CAT, Mompongo must "establish that it is more likely than not that he . . . would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2). We will overturn the IJ's denial of withholding of removal or protection under the CAT only if the evidence is so compelling that no reasonable factfinder would have denied relief. *Ngure*, 367 F.3d at 989, 992.

The IJ determined Mompongo failed to establish it is more likely than not he would be harmed should he return to the DRC. The IJ found Mompongo's testimony credible and recognized the fall of the Mobutu government, to which Mompongo's family was well-connected, resulted in political unrest, civil unrest, and "the prospect of lower living standards under the new government" for family members of principal figures in the Mobutu administration. However, the IJ concluded Mompongo's family connections, including a cousin who was a member of the Mobutu bodyguard and another cousin who worked as a Mobutu journalist and now works for a rebel group, fail to establish it is more likely than not Mompongo would be harmed if he returned to the DRC. Also considering the current conditions in the DRC, the IJ found it unlikely Mompongo, as a relative of Mobutu supporters, would face a clear probability of harm.

We conclude substantial evidence supports the IJ's findings. *See Ngure*, 367 F.3d at 989 (upholding findings if supported by substantial evidence). The evidence does not compel a reasonable factfinder to find Mompongo eligible for withholding of removal or protection under the CAT. The record contains no evidence showing any of Mompongo's remaining family members in the DRC have been physically harmed since the change in government, and no evidence indicates Mompongo would be harmed based upon his family's political connections or his political opinions. Mompongo also offered nothing to suggest he would be tortured should he return to the DRC. The State Department reported it was "not aware of family members of former principal figures in the Mobutu administration being mistreated by the [new] government." Thus, we affirm the denial of withholding of removal and protection under the CAT.

III. CONCLUSION

We deny Mompongo's petition for judicial review.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A79-263-058 - BLOOMINGTON

In re: MOMPONGO, BOKOLE ELONGO

IN REMOVAL PROCEEDINGS
APPEAL

DECISION OF THE BOARD OF IMMIGRATION APPEALS

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). The respondent's application for asylum was not adjudicated insofar as he failed to meet the statutory deadline requisite to making application for that relief. The respondent failed to meet his burden of proof in order to be afforded withholding of removal to the Democratic Republic of Congo or relief pursuant tot he Convention Against Torture. Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/_____
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
7850 Metro Parkway, Suite 320
Bloomington, MN 55425

Case A79-263-058

In the Matter of
Bokole Elongo Mompongo

IN REMOVAL PROCEEDING

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 12/11/2002. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

X Respondent's application for voluntary departure was granted until February 10, 2003 upon posting a bond in the amount of $500.00 with an alternative order of removal to Dem. Rep. of Congo.

X Respondent's application for assylum was denied.

X Respondent's application for withholding of removal was denied.

X Respondent's application for withholding removal under Article III of the Convention Against Torture is denied.

X Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

X Other: Respondent must present currently-valid passport to INS by 2/10/03 to be eligible for voluntary departure.

Date: 11/11/02

Appeal Due By: January 10, 2003

/s/_____
Joseph Dierkes, Immigration Judge